

is self-effectuating and terminates the case in and of itself; no order or other action of the district court is required.” *In re Amerijet, Inc.*, 785 F.3d 967, 973 (5th Cir. 2015) (per curium).

Plaintiffs seek to dismiss “the prospective nuisance cause of action under the Texas Water Code violation claims under 28 U.S.C. § 1331.” (Dkt. No. 91). In the Third Amended Complaint, “[NABA] brings a prospective nuisance claim against Defendants.” (Dkt. No. 55 at ¶ 23). Plaintiffs also bring defamation and business disparagement claims in the Third Amended Complaint (Dkt. No. 55 at ¶¶ 24-26), but those claims were severed and remanded to the 398th Judicial District Court in Hidalgo County, Texas. (Dkt. No. 88). The Third Amended Complaint does not mention a Texas Water Code violation.¹ Thus, the Court interprets “the prospective nuisance cause of action under the Texas Water Code violation claims under 28 U.S.C. § 1331” (Dkt. No. 91) as the “prospective nuisance claim against Defendants,” which is the only claim pending in this Court.

Defendants Brian Kolfage and We Build the Wall, Inc. (“WBTW”) never filed an answer or a motion for summary judgment.² Therefore, the actions against Brian Kolfage and WBTW are **DISMISSED** with prejudice, as requested. (Dkt. Nos. 91, 92). WBTW’s Motion to Dismiss Plaintiffs’ Third Amended Complaint (Dkt. No. 64) is **DENIED** as moot.

Defendant Neuhaus & Sons, LLC (“Neuhaus”) filed an Original Answer to the First Amended Petition and Application for Injunctive Relief (Dkt. No. 10), and Defendants Fisher Sand

¹ In the Plaintiffs’ First Amended Petition and Application for Injunctive Relief, NABA sought damages and equitable relief pursuant to § 11.086(b) of the Texas Water Code. (Dkt. No. 9, Exh. B at ¶ 24). Such a claim is not made in the live pleading. *See* (Dkt. No. 55).

² WBTW filed a Rule 12(b) motion to dismiss. (Dkt. No. 64). A Rule 12(b) motion does not preclude a plaintiff’s voluntary dismissal under Rule 41(a)(1)(A)(i). *Sanchez v. McCormick Trucking Inc.*, No. 3:21-cv-1471-C-BT, 2021 WL 3176038 (N.D. Tex. July 8, 2021), *report and recommendation adopted*, No. 3:21-cv-1471-C-BT, 2021 WL 3173905 (N.D. Tex. July 27, 2021); *Richardson v. U.S. Bank Nat’l Ass’n*, No. 3:16-cv-2434-N-BN, 2016 WL 5871327, at *2-*3 (N.D. Tex. Oct. 6, 2016), *report and recommendation adopted*, No. 3:16-cv-2434-N-BN, 2016 WL 5871328 (N.D. Tex. Oct. 7, 2016); *see In re Amerijet, Inc.*, 785 F.3d 967, 973-74 (5th Cir. 2015) (per curium) (“[O]nly an answer or a motion for summary judgment will suffice to preclude a plaintiff from dismissing under Rule 41(a)(1)(A)(i).”).

and Gravel Co. and Fisher Industries (collectively “Fisher Defendants”) filed a First Amended Original Answer (Dkt. No. 63). Accordingly, NABA is precluded from dismissing the actions against Neuhaus and Fisher Defendants under Rule 41(a)(1)(A)(i). The Court **ADVISES** Plaintiffs, Neuhaus, and Fisher Defendants to file a stipulation of dismissal under and in compliance with Rule 41(a)(1)(A)(ii) if they wish to dismiss the actions against Neuhaus and Fisher Defendants.

SO ORDERED February 3, 2022, at McAllen, Texas.

A handwritten signature in black ink, appearing to read "Randy Crane", written over a horizontal line.

Randy Crane
United States District Judge